

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

7 SANDRA RADA, ) 2:11-cv-00652-ECR-GWF  
8 Plaintiff, )  
9 vs. ) **Order**  
10 COX ENTERPRISES, INC., a Georgia )  
Corporation, as Plan Administrator )  
of the Cox Enterprises, Inc. )  
Welfare Benefits Plan; AETNA LIFE )  
12 INSURANCE COMPANY, as Claims )  
Administrator of the Cox )  
13 Enterprises, Inc. Welfare Benefits )  
Plan; DOES I through V; and ROE )  
14 CORPORATIONS I through V )  
15 Defendant. )  
16 )

Now pending are a Motion for Judgment on the Pleadings and Administrative Record (#20) and a Counter-Motion for Judgment on the Pleadings and Administrative Record (#21) arising out of a complaint regarding the wrongful termination of disability benefits under an employer-provided Long Term Disability Plan.

The motions are ripe, and we now rule on them.

## I. Factual and Procedural Background

Plaintiff Sandra Rada ("Plaintiff"), a Clark County, Nevada resident, was employed by Defendant Cox Enterprises, Inc. ("Cox") beginning January 1, 2005. (Compl. ¶¶ 4-5 (#1).) For the relevant

1 time period, Defendant Aetna Life Insurance Company ("Aetna") was  
2 Cox's agent and the designated Claims Administrator of Cox's Long-  
3 Term Disability Plan for its employees, providing administrative  
4 services under the plan as outlined in the Administrative Services  
5 Agreement between Aetna and Cox. (Id. ¶ 6.) Cox fully insured the  
6 plan, but Aetna handled claims and made the ultimate decision of  
7 whether to accept, deny, or terminate long-term disability claims.  
8 (Id.)

9 On March 13, 2008, Plaintiff suffered a motor vehicle accident  
10 leaving her with head trauma, scalp laceration requiring 30 sutures,  
11 multiple contusions, and sprain/strain injuries to her neck and  
12 back. (Id. ¶ 8.) Plaintiff continues to experience post-concussive  
13 symptoms including depression, anxiety, headaches, memory loss,  
14 difficulty concentrating, word-finding problems, sleep disturbance,  
15 confusion, and fatigue. (Id.)

16 As of March 13, 2008, Plaintiff was employed 40 hours a week as  
17 a Customer Service Representative at Cox, with duties including  
18 handling incoming calls, introducing and selling new products and  
19 services, handling customer problems and queries and providing  
20 responses, initiating billing adjustments, and other clerical and  
21 administrative tasks. (Id. ¶ 9.)

22 Due to her accident, Plaintiff was unable to return to work.  
23 She applied for and received short term disability benefits for six  
24 months from her short term disability insurance carrier, UNUM. (Id.  
25 ¶ 11.) In August, 2008, Plaintiff applied for long-term disability  
26 benefits under Cox's Long Term Disability Plan. (Id. ¶ 12.) Under  
27 Cox's plan, an employee is eligible for benefits in the first 24

1 months of total disability if “[they] are not able, solely because  
2 of injury or disease, to work at [their] own occupation.” (Id. ¶  
3 10.) After the first 24 months, an employee is eligible for  
4 benefits if “[they] are not able, solely because of injury or  
5 disease, to work at any reasonable occupation.” (Id.) “Any  
6 reasonable occupation” is further defined under the plan as “any  
7 gainful activity for which [an employee is], or may reasonably  
8 become, fitted by education, training, or experience. It does not  
9 include work under an approved rehabilitation program.” (Id.)  
10 Aetna accepted Plaintiff’s claim and paid Plaintiff’s long-term  
11 disability benefits from September 14, 2008 through April 9, 2010.  
12 (Id.)

13 On January 22, 2010, through Aetna’s referral to its vendor  
14 Allsup, Plaintiff was awarded Social Security Disability benefits  
15 from the Social Security Administration (“SSA”). (Id. ¶ 13.) The  
16 SSA deemed Plaintiff disabled as of December 6, 2009, and Plaintiff  
17 continues to receive Social Security benefits. (Id. ¶ 13.)

18 On December 12th, 2009, Dr. Cruz, Plaintiff’s primary  
19 physician, completed an Attending Physician’s Statement as requested  
20 by Aetna, with a primary diagnosis of traumatic brain injury with  
21 complications of cognitive and physical impairment. (Id. ¶ 14.)  
22 Plaintiff was seen by neurologist Daniel J. Broeske, MD, on January  
23 5, 2010, where he stated that Plaintiff exhibited symptoms of  
24 “short-term memory impairment, distractibility, and inattention  
25 “partially borne out by objective testing today.” (Id. ¶ 15.) On  
26 January 7, 2010, at Aetna’s request, Plaintiff filled out an  
27 Activities of Daily Living form, describing symptoms of memory loss,  
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1 difficulty understanding directions, sleep disturbances, headache,  
2 lightheadedness, burning and tingling into her right arm, back, and  
3 legs, word finding difficulty, right arm pain, and right leg pain  
4 increased on prolonged standing. She noted that she did not feel  
5 she could return to work due to her head injury and understanding  
6 difficulties. (Id. ¶ 16.)

7 On February 25, 2010, Aetna referred Plaintiff's claim for peer  
8 review by an occupational medicine specialist. (Id. ¶ 17.) The  
9 specialist stated that the medical documentation did not indicate a  
10 functional impairment from any occupation. (Id.) Aetna forwarded  
11 the review to Dr. Cruz for his opinion on the matter, stating that  
12 if he failed to respond within 15 days, his failure to respond would  
13 be taken as a confirmation of the peer reviewer's analysis. (Id.)  
14 Dr. Cruz did not respond within 15 days but did respond on April 22,  
15 2010. (Id.)

16 After 24 months had passed, shifting Plaintiff's occupational  
17 analysis under the Long Term Disability Plan from "her occupation"  
18 to "any occupation," Aetna concluded on April 8, 2010 that Plaintiff  
19 would be eligible for several different occupations based on her  
20 training and education and the findings of its peer reviewer that  
21 she could work at a sedentary job. (Id. 18.) The occupations  
22 listed included Customer Service Representative, Circulation Clerk,  
23 Dispatcher, and Credit Card Clerk. (Id.) In a letter to Plaintiff  
24 dated April 14, 2010, Aetna terminated Plaintiff's long-term  
25 disability benefits effective April 9, 2010 for the foregoing  
26 reasons along with Dr. Cruz's failure to respond to the peer  
27 reviewer's letter. (Id. ¶ 19.) In the letter, Aetna informed

1 Plaintiff that she could appeal Aetna's decision if she prepared a  
 2 narrative report outlining the extent of her disability. (*Id.* ¶  
 3 20.).

4 Plaintiff submitted her appeal letter to Aetna on January 10,  
 5 2011 through her attorney. (*Id.* ¶ 21.) Her letter included updated  
 6 medical records from several of her doctors including Dr. Cruz,  
 7 additional records from Drs. Dylan Wint, MD, and Thomas Kinsora,  
 8 Ph.D, the pertinent parts of which are discussed in subsequent  
 9 sections. (*Id.* ¶ 21.) The appeal letter also included the  
 10 disability benefits award letter from the SSA. (*Id.*)

11 In a February 21, 2011 letter, Aetna "partially overturned" its  
 12 April 14, 2010 decision, re-extending Plaintiff's benefits from  
 13 April 9, 2010 through November 30, 2010. (*Id.* ¶ 24.) Aetna refused  
 14 to extend benefits beyond November 30, 2010, stating that "the  
 15 records presented for review do not provide any abnormal examination  
 16 findings, imaging studies, or behavioral observations, dated after  
 17 11/30/10, to document any specific impairment that would prevent  
 18 [Plaintiff] from performing the work of any occupation." (*Id.*) The  
 19 denial was based on new physical examinations, doctors' reports, and  
 20 peer-to-peer conversations, further discussed in subsequent  
 21 sections. (*Id.* ¶ 25.)

22 On March 7, 2011, Plaintiff's attorney wrote a letter to Aetna  
 23 inquiring whether Aetna had received confirmation that the comments  
 24 attributed to Plaintiff's doctors in peer-to-peer conversations were  
 25 accurate and urging Aetna to obtain Plaintiff's Social Security  
 26 benefits documents. (*Id.* ¶ 28.) On March 9, 2011, Dr. Wint wrote a  
 27 letter to Aetna clarifying his comments made during peer-to-peer  
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1 conversation, discussed further in subsequent sections. (Id. ¶ 30.)  
2 On March 18, 2011, Aetna wrote a letter to Plaintiff's attorney  
3 refusing to reconsider its denial of benefits. (Id. ¶ 31.)

4 On April 26, 2011, Plaintiff filed her Complaint (#1) with this  
5 court, seeking relief for wrongful termination of her disability  
6 benefits under 29 U.S.C. § 1132(a)(1)(B). On May 31, 2011,  
7 Defendants Cox and Aetna filed their Answer (#7). On June 16, 2011,  
8 this court issued an Order (#11) demanding that Defendants produce  
9 the administrative record. On September 15, 2011, Defendants  
10 supplied the administrative record (#16). On November 8, 2011,  
11 Plaintiff filed a Rule 52 Motion for Judgment on the Pleadings and  
12 Administrative Record (#20). On December 8, 2011, Defendants filed  
13 their Response and a Counter-Motion for Judgment on the Pleadings  
14 and Administrative Record (#21). On January 11, 2012, Plaintiff  
15 filed a Reply (#22) to Defendants' Response and Counter-Motion. On  
16 February 7, 2012, Defendants filed a Reply (#23) in support of their  
17 Counter-Motion.

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19 **II. Judgment on the Pleadings and Administrative Record Standard**

20 A party may move for judgment on the pleadings and  
21 administrative record pursuant to Federal Rule of Civil Procedure  
22 52. "Although Rule 43(a) requires that 'testimony' be taken in open  
23 court, the record should be regarded as being in the nature of  
24 exhibits, in the nature of documents, which are routinely a basis  
25 for findings of fact even though no one reads them out loud."  
26 Kearney v. Standard Ins. Co., 175 F.3d 1084, 1094 (9th Cir. 1999).  
27 District courts are permitted to "try the case on the record that

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1 the administrator had before it," a method that is "vastly less  
 2 expensive to all parties." Id. at 1095.

3 In a bench trial on the record, "the judge will have to make  
 4 findings of fact under Federal Rule of Civil Procedure 52(a)." Id.  
 5 Under Federal Rule of Civil Procedure 52 (a)(1), "in an action tried  
 6 on the facts without a jury or with an advisory jury, the court must  
 7 find the facts specially and state its conclusions of law  
 8 separately." This standard amounts to findings of fact in  
 9 "narrative form, i.e., which appear in a 'memorandum of decision  
 10 filed by the court.'" In re Girardi, 611 F.3d 1027, 1040 n.3 (9th  
 11 Cir. 2010).

12 Findings of fact are reviewed for "clear error" and not set  
 13 aside "unless clearly erroneous." Edgmon v. United States, 449 Fed  
 14 Appx. 576, 577 (9th Cir. 2011); Fed. R. Civ. P. 52(a)(6). A finding  
 15 of fact is clearly erroneous if the district court is "left with a  
 16 definite and firm conviction that a mistake has been made." Beech  
 17 Aircraft Corp. v United States, 51 F.3d 834, 838 (9th Cir. 1995).

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19 **III. Discussion**

20 **A. Standard of Review**

21 Plaintiff seeks relief under the Employee Retirement Income  
 22 Security Act for wrongful termination of her long-term disability  
 23 benefits. 29 U.S.C. § 1132(a)(1)(B). Plaintiff maintains that  
 24 Aetna's termination of her claim should be reviewed de novo by this  
 25 court because the Long Term Disability Plan contains no reference to  
 26 the plan administrator retaining discretion to decide claims.

27 (Pl.'s Mot. J. Pleadings and Administrative R. at 2 (#20).) Aetna

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1 contends that its termination should be reviewed under an abuse of  
 2 discretion standard because of language in the Administrative  
 3 Services Contract between Aetna and Cox conferring discretionary  
 4 power upon Aetna. (Defs.' Resp. at 2 (#21).) When a plan does not  
 5 confer discretionary power upon an entity, the standard of review is  
 6 de novo. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 963  
 7 (9th Cir. 2006). When the plan does grant discretionary authority  
 8 upon an entity, the entity's action is reviewed under an abuse of  
 9 discretion standard. Id.

10 A document that is not "itself part of the plan" cannot confer  
 11 discretionary power on an entity. CIGNA Corp. v. Amara, 131 S. Ct.  
 12 1866, 1878 (2011). Cases have upheld such additional documents only  
 13 when they are integrated with the plan itself in some way. See,  
 14 e.g., Langlois v. Metropolitan Life Ins. Co., 833 F. Supp.2d 1182,  
 15 1185 (N.D. Cal. 2011) (recognizing other plan documents because they  
 16 were included under a specific integration clause in the plan); Lee  
 17 v. Kaiser Foundation Health Plan Long Term Disability Plan, 812 F.  
 18 Supp.2d 1027, 1036 (N.D. Cal. 2011) (recognizing other plan  
 19 documents because they were "within [the plan's] umbrella"); Eugene  
 20 S. v. Horizon Blue Cross Blue Shield of New Jersey, 663 F.3d 1124,  
 21 1131 (10th Cir. 2011) (finding that discretionary authority was  
 22 conferred because the plan language indicated that the summary plan  
 23 document "is the plan"). The Administrative Services Contract cited  
 24 to by Aetna is not part of the plan, integrated or otherwise, and is  
 25 not distributed to employees. It does not confer discretionary  
 26 authority on Aetna for reviewing Plaintiff's claims.

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1 Aetna claims language in the plan itself is consistent with a  
 2 grant of discretionary authority to Aetna. (Defs.' Resp. at 3  
 3 (#21).) It points to language (1) requiring a claim to be submitted  
 4 to Aetna; (2) allowing Aetna to request proof from a claimant; (3)  
 5 giving Aetna the right to have a physician or dentist examine a  
 6 claimant; and (4) requiring Aetna to approve a program for  
 7 rehabilitation. (*Id.*) However, this language is too narrow to  
 8 constitute a broad grant of discretionary authority. While there is  
 9 no "magic word" that creates discretionary authority, Abatie, 458  
 10 F.3d at 963, a small list of narrow areas in which an entity has  
 11 authority does not confer complete discretionary authority upon the  
 12 entity. The plan language must "unambiguously provide discretion to  
 13 the plan administrator." Feibusch v. Integrated Device Technology,  
 14 Inc. Employee Ben. Plan, 463 F.3d 880, 883 (9th Cir. 2006). The  
 15 plan language cited to by Aetna does not unambiguously create  
 16 discretionary authority, and the standard of review adopted by this  
 17 court is therefore de novo.

18 Under a de novo standard of review, "[t]he court simply  
 19 proceeds to evaluate whether the plan administrator correctly or  
 20 incorrectly denied benefits, without reference to whether the  
 21 administrator operated under a conflict of interest." Abatie, 458  
 22 F.3d at 963. District courts are required under this standard to  
 23 "undertake an independent and thorough inspection of an  
 24 administrator's decision." Silver v. Executive Car Leasing Long-  
Term Disability Plan, 466 F.3d 727, 733 (9th Cir. 2006). The burden  
 26 of proving wrongful termination of benefits is on the claimant.  
 27 Muniz v. Amec Const. Management, Inc., 623 F.3d 1290, 1294 (9th Cir.

1 2010). Plaintiff must therefore satisfy her burden of proving that  
 2 her disability benefits under Aetna's Long Term Disability Plan were  
 3 wrongfully terminated.

4           B. Aetna's Review of Plaintiff's Medical Evidence

5 Plaintiff claims that Aetna failed to give proper weight to the  
 6 statements of three of her physicians, Drs. Wint, Kinsora, and Cruz,  
 7 regarding limitations on her ability to work. (Pl.'s Mot. J.  
 8 Pleadings and Administrative R. at 7-10 (#20).) Plan administrators  
 9 abuse their discretion when they focus only on "slivers" of the  
 10 record supporting their decisions and ignore other relevant parts of  
 11 the record. Metropolitan Life Ins. Co. v. Conger, 474 F.3d 258, 265  
 12 (6th Cir. 2007). Moreover, "[p]lan administrators . . . may not  
 13 arbitrarily refuse to credit a claimant's reliable evidence,  
 14 including the opinions of a treating physician." Black & Decker  
 15 Disability Plan v. Nord, 538 U.S. 822, 834 (2003). However,  
 16 administrators need not accord special weight to the statements of a  
 17 treating physician, nor are they barred from crediting reliable  
 18 evidence from sources that contradict the treating physician(s).

19 Id.

20 Plaintiff points to language from her neurologist, Dr. Wint, in  
 21 an itemized job restriction and limitation report. (Pl.'s Mot. for  
 22 J. on the Pleadings and Administrative R. p. 7 (#20).) In his  
 23 report, Dr. Wint indicates that Plaintiff could perform non-creative  
 24 sedentary tasks not "dependent on interpersonal interaction" for  
 25 "limited periods" and that a "slow introduction to the workplace"  
 26 was necessary. (AETNA at 000989-000990 (#16).) While Aetna does  
 27 not directly address this report in its letter terminating

1 Plaintiff's benefits, it extensively addresses Plaintiff's various  
 2 appointments with Dr. Wint, from a period where her psychological  
 3 symptoms were preventing her from functioning to her last visit with  
 4 Dr. Wint, where she showed marked improvement in her psychological  
 5 symptoms and showed no severe cognitive deficits in a  
 6 neuropsychological test ordered by Dr. Wint and performed by Dr.  
 7 Kinsora. (*Id.* at 001093-001098.) Moreover, the itemized report by  
 8 Dr. Wint does not conclusively indicate that she would be unable to  
 9 work at any reasonable occupation. Dr. Wint lists several job  
 10 activities that would be appropriate for Plaintiff and indicates  
 11 that a "slow introduction to the workplace" would be appropriate.  
 12 (*Id.* at 000989-000990).

13 Dr. Wint's March 9, 2011 letter to Aetna clarifying statements  
 14 he made during a peer-to-peer conversation does not significantly  
 15 change the evidence. In his letter of clarification, Dr. Wint  
 16 acknowledges that Plaintiff's cognitive abilities are only mildly  
 17 impaired but clarifies that her emotional capacity is extremely  
 18 impaired. (*Id.* at 001079.) Nevertheless, he still refrains from  
 19 precluding Plaintiff from gainful employment and instead argues for  
 20 "a slow re-introduction to work under special circumstances." (*Id.*)  
 21 Indeed, the first two paragraphs of his letter are dedicated to what  
 22 types of work Plaintiff *would* be fit for, far from an outright  
 23 denial of her ability to work.

24 Plaintiff further argues that Aetna ignored evidence from Dr.  
 25 Kinsora that indicates that Plaintiff may not be able to return to  
 26 the workplace. (Pl.'s Mot. J. Pleadings and Administrative R. at 8-  
 27 9 (#20).) In particular, Plaintiff directs this court to language  
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1 from a neurocognitive assessment where Dr. Kinsora stated that "the  
 2 intensity of her depression, anxiety, and [MVA]-related PTSD  
 3 symptoms . . . suggests that it may be difficult for her to return  
 4 to work on a full-time basis." (AETNA at 001006 (#20).) This  
 5 language, while urging caution regarding Plaintiff's return to the  
 6 workplace, does not definitively preclude Plaintiff from gainful  
 7 employment. In the same report, Dr. Kinsora describes most of  
 8 Plaintiff's cognitive problems as "mild" and indicates that they  
 9 will "worsen with anxiety, and when she is in a noisy, or chaotic  
 10 environment." (Id.) Plaintiff provides no evidence that her  
 11 occupational choices will be limited to noisy and anxiety-inducing  
 12 environments. Additionally, as Aetna points out in its termination  
 13 letter, Plaintiff showed no cognitive deficits in her  
 14 neuropsychological examination by Dr. Kinsora. (Id. at 001093-  
 15 001098.) Finally, in the same report cited to by Plaintiff, Dr.  
 16 Kinsora states that Plaintiff "should be encouraged to remain as  
 17 socially and physically active as possible." (Id. at 001007.)

18 While Aetna did not cite in its termination letter some of the  
 19 passages that Plaintiff mentions, it did consider the results of Dr.  
 20 Kinsora's neuropsychological examination in general. Id. at 001093-  
 21 001098.) Moreover, the above statements by Dr. Kinsora about  
 22 Plaintiff's fitness for employment do not render Aetna's decision  
 23 unreasonable. On the contrary, Dr. Kinsora's statements could be  
 24 interpreted as urging a cautious re-introduction of Plaintiff to the  
 25 workforce.

26 Plaintiff also cites an October 2010 statement by her primary  
 27 care physician, Rafael Cruz, where he states that "it is difficult  
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1 for me to understand how this patient can be deemed as functional,  
2 considering her accident, mentation, cognition in lieu of her job  
3 description." (Id. at 000976.) However, Cruz deferentially adds  
4 that "if the [patient] is deemed functional, then a functional  
5 capacity [evaluation] should be obtained and any assistance  
6 necessary for her gainful employment should be provided." (Id.)  
7 These statements do not preclude Plaintiff from gainful employment,  
8 and, as they arise out of a routine physical examination by a  
9 general practitioner, they should be given less weight than the more  
10 specialized neurological examinations and evaluations provided by  
11 Drs. Kinsora and Wint.

12 While Aetna does not discuss every equivocation by each doctor  
13 in its termination letter, it provides a sufficiently thorough  
14 review of the relevant evidence. Aetna acknowledges the ongoing  
15 emotional difficulties that may hinder Plaintiff in the workplace.  
16 (Id. at 001097) However, Aetna's review also reveals a  
17 neuropsychological examination indicating no cognitive deficits, a  
18 normal EEG, and statements by Drs. Wint and Kinsora that indicate  
19 Plaintiff would be fit for certain occupational settings. (Id.)  
20 Aetna further conducted peer-to-peer conversations with Drs. Broeske  
21 and Owens, who confirmed that they had treated her but were unable  
22 to comment on her fitness for an occupational setting. (Id.) Aetna  
23 appears to have weighed the relevant evidence and come to a  
24 conclusion that is well supported by the administrative record.  
25 Aetna has not ignored any evidence that would unequivocally suggest  
26 that Plaintiff cannot work.

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1                   C. Aetna's Peer to Peer Conversations During Plaintiff's  
 2 Appeal

3                 Plaintiff claims that Aetna failed to fulfill its obligation to  
 4 afford Plaintiff "a reasonable opportunity . . . for a full and fair  
 5 review," 29 U.S.C. § 1133, by obtaining peer-to-peer medical  
 6 conversations with Plaintiff's doctors during the appeal process  
 7 that Plaintiff and her doctors could not address before the final  
 8 denial. (Pl.'s Mot. J. Pleadings and Administrative R. (#20).)  
 9 Plaintiff cites Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 689  
 10 (7th Cir. 1992), for the proposition that the administrator must  
 11 provide the claimant with all of the relevant evidence it relied  
 12 upon and give the claimant the opportunity to address the accuracy  
 13 and reliability of that evidence.

14                 Plaintiff overstates the law. A plan administrator is required  
 15 by regulation to disclose to the claimant all documents relevant to  
 16 the appeal. 29 C.F.R. § 2560.503-1(i)(5). However, after a  
 17 claimant has submitted an appeal, an administrator can prepare  
 18 further documents relevant to Plaintiff's appeal and is only  
 19 required to disclose them upon request *after* it makes its final  
 20 determination. Silver v. Executive Car Leasing Long-Term Disability  
 21 Plan, 466 F.3d 727, 731 n.2 (9th Cir. 2006); 29 C.F.R.  
 22 2560.503-1(h)(2)(iii). To require administrators to allow claimants  
 23 to review every document it prepares on appeal before it makes its  
 24 final decision would "lead to an interminable back-and-forth between  
 25 the plan administrator and the claimant." Silver, 466 F.3d at 731  
 26 n.2; see also Metzger v. Unum Life Ins. Co. of Am., 476 F.3d 1161,  
 27 1166-67 (10th Cir. 2007) (finding that allowing claimants to review

1 and rebut reports generated during the appeal process would lead to  
 2 an "unnecessary cycle of submission, review, re-submission, and  
 3 re-review"). Allowing such claimant review on appeal would also  
 4 "prolong the appeal process, which, under the regulations, should  
 5 normally be completed within 45 days." Metzger, 476 F.3d at 1166  
 6 (citing 29 C.F.R. § 2560.503-1(i)(3)(i)). As long as the claimant  
 7 has access to the documents generated on appeal at the district  
 8 court where she brings her claim, the claimant is deemed to have  
 9 "had ample opportunity to respond." Silver, 466 F.3d at 731 n.2.

10 Aetna was therefore justified in conducting peer-to-peer  
 11 conversations during Plaintiff's appeal and not disclosing  
 12 information from the conversations until it made its final  
 13 determination. Aetna provided in its termination letter the peer-  
 14 to-peer statements it relied upon in its decision. Plaintiff has  
 15 had ample opportunity to raise any objections her doctors may have  
 16 to Aetna's portrayal of their statements at the district court  
 17 level. The one clarification she provided, Dr. Wint's March 9th,  
 18 2011 letter (AETNA 001079 (#16)), does not significantly change the  
 19 evidence Aetna relied upon. See supra Part III.B. Plaintiff has  
 20 not requested any additional documents from Aetna regarding the  
 21 peer-to-peer conversations, nor has she disputed other statements  
 22 attributed to her doctors in Aetna's termination letter.

23 Plaintiff argues that she was not given a full and fair review  
 24 because comments attributed to her doctors were "provided by  
 25 unidentified individuals." (Mot. J. Pleadings and Administrative R.  
 26 at 7 (#20).) However, Plaintiff cites no legal authority requiring  
 27 conductors of peer-to-peer conversations to be specifically

1 identified, nor does there appear to be any. See Midgett v.  
 2 Washington Group Intern. Long Term Disability Plan, 561 F.3d 887,  
 3 896 (8th Cir. 2009) ("we are aware of [no established law] requiring  
 4 peer reviews to be performed by examining physicians, requiring a  
 5 plan administrator to provide detailed credentials of peer  
 6 reviewers, or prohibiting peer reviews from appearing on a plan  
 7 administrator's form"). Moreover, because the evidence obtained by  
 8 Aetna from the peer conversations consists only of Plaintiffs'  
 9 doctors' statements and involves no independent judgment by the peer  
 10 reviewers, this court will not require further information about  
 11 Aetna's peers. Nor will we question the validity of the statements  
 12 attributed to the doctors unless Plaintiff provides a compelling  
 13 reason to do so, which she has not.

14           D. Aetna's Lack of Vocational Evidence

15 Plaintiff claims that Aetna failed to give her a full and fair  
 16 review by failing to provide vocational evidence regarding whether  
 17 Plaintiff would be fit for "any occupation" with the restrictions  
 18 provided by her doctors. (Mot. J. Pleadings and Administrative R.  
 19 at 9 (#20).) However, in cases where the "any occupation" standard  
 20 applies, "consideration of vocational evidence is unnecessary where  
 21 the evidence in the administrative record supports the conclusion  
 22 that the claimant does not have an impairment which would prevent  
 23 him from performing some identifiable job." McKenzie v. General  
 24 Telephone Co. of California, 41 F.3d 1310, 1317 (9th Cir. 1994).  
 25 See also Regula v. Delta Family-Care Disability Survivorship Plan,  
 26 266 F.3d 1130, 1149 (9th Cir. 2001) (holding that because there "is  
 27 ample evidence in the record to support [the plan administrator's]

1 conclusion that [Plaintiff] could perform some occupation," the plan  
 2 administrator is not required to provide specific vocational  
 3 evidence stating what jobs Plaintiff can perform).

4 Here, there is no evidence that unequivocally suggests that  
 5 Plaintiff is not fit for any job, and several of Plaintiff's doctors  
 6 provide guidelines for returning to a vocational setting. Dr. Wint  
 7 indicates that Plaintiff's most debilitating impairments at this  
 8 point are emotional and can be managed with a slow-reintroduction to  
 9 the workforce. (AETNA at 001079 (#16).) Dr. Kinsora suggests that  
 10 it would be unadvisable for Plaintiff to work in a noisy or chaotic  
 11 environment, (AETNA at 001006 (#16).), but there is no reason to  
 12 assume that Plaintiff's choice of sedentary office jobs would be  
 13 restricted to noisy or chaotic ones. Aetna had sufficient evidence  
 14 to determine that Plaintiff was fit for some form of "gainful  
 15 activity in which [she is], or may reasonably become, fitted by  
 16 education, training, or experience."

17 E. Plaintiff's Social Security Award

18 Plaintiff argues that Aetna failed to give proper weight to  
 19 Plaintiff's Social Security benefits award. (Mot. J. Pleadings and  
 20 Administrative R. at 10-11 (#20).) However, the cases she points to  
 21 supporting the conclusion that a plan administrator conducted an  
 22 insufficient review by failing to adequately consider Social  
 23 Security benefits list such a failure as one among several factors  
 24 amounting to an insufficient review. See, e.g., Montour v. Hartford  
Life & Acc. Ins. Co., 588 F.3d 623, 637 (9th Cir. 2009) (finding  
 25 signs of bias, insufficiency in the surveillance of plaintiff's  
 26 activities, failure to ensure a neutral review process, and failure  
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1 to conduct a physical exam along with failure to consider  
 2 plaintiff's award of Social Security benefits to amount to an abuse  
 3 of discretion); Pierce v. American Waterworks Co., Inc., 683 F.Supp.  
 4 996, 1001 (W.D. Pa. 1988) (finding that the overall decision was  
 5 "not supported by substantial evidence"). While a plan  
 6 administrator's failure to review a social security decision is a  
 7 factor in demonstrating an arbitrary or insufficient review, it  
 8 "does not render the decision arbitrary *per se*." Glenn v. MetLife,  
 9 461 F.3d 660, 669 (6th Cir. 2006). Plaintiff has failed to  
 10 establish that Aetna conducted an insufficient review in any other  
 11 way, so it is not clear that Aetna's review would be insufficient  
 12 even if it had failed to review the SSA's decision.

13       Additionally, Aetna points to several differences in how  
 14 disability is assessed by the Social Security Administration and  
 15 under the Long Term Disability Plan drafted by Cox. (Defs.' Resp.  
 16 at 15-16 (#21).) The Social Security Act defines an individual as  
 17 "disabled" if "he is not only unable to do his previous work but  
 18 cannot, considering his age, education, and work experience, engage  
 19 in any other kind of substantial, gainful work which exists in the  
 20 national economy." 42 U.S.C. § 423(d)(2)(A). Comparatively, Cox's  
 21 Long Term Disability plan defines an individual as disabled if  
 22 "after the first 24 months of a period of total disability, [they]  
 23 are not able solely because of injury or disease to work at any  
 24 reasonable occupation," further clarifying that "reasonable  
 25 occupation" means "any gainful activity for which you are, or may  
 26 reasonably become, fitted by education, training, or experience."  
 27 (AETNA at 000004 (#16).)

1       As Aetna points out, the Social Security definition of  
2 "disabled" narrows the jobs a claimant is considered eligible for by  
3 taking into account the claimant's age and restricting the job  
4 market to the "national" economy. The Social Security Act also  
5 requires that a claimant be able to find "substantial" gainful  
6 employment, while Cox's Long Term Disability Plan recognizes "any"  
7 reasonable gainful employment, though Aetna does not explain what  
8 difference this makes as a practical matter. Also, unlike the SSA,  
9 Aetna is not bound by the treating physician rule, which requires  
10 the SSA to accord "special weight" to the opinions of a claimant's  
11 treating physician. Black & Decker Disability Plan, 538 U.S. at  
12 831.

13       The most important difference between the Social Security  
14 Administration's review and Aetna's review, however, is that Aetna  
15 was reviewing Plaintiff's claim with more updated information.  
16 Plaintiff was awarded her Social Security benefits in the fourth  
17 quarter of 2009. (AETNA at 001042.) Aetna's determination  
18 regarding Plaintiff's disability status was made nearly a year after  
19 that, taking into consideration new medical records and doctor  
20 testimony. Much of the information that Aetna relied upon for its  
21 latest decision would not have been available to the SSA at the time  
22 they composed their January 22, 2010 letter.

23       In its termination letter, Aetna acknowledges the SSA's  
24 decision but points out the differences in the records relied upon  
25 and the entities' methodologies. (Id. at 001097.) Given the  
26 foregoing analysis of the differences between the two entities'  
27  
28

1 methods and information, Aetna was justified in acknowledging the  
2 SSA's decision but refusing to treat it as dispositive.

3

4 **IV. Conclusion**

5 Plaintiff has failed to show that Aetna did not give her a full  
6 and fair administrative review under its Long Term Disability Plan.  
7 Plaintiff's Motion for Judgment on the Pleadings and Administrative  
8 Record (#20) is denied, Aetna's termination of Plaintiff's benefits  
9 is upheld, and Defendants' Counter-Motion for Judgment on the  
10 Pleadings and Administrative Record (#21) is granted.

11

12 **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's Motion for  
13 Judgment on the Pleadings and Administrative Record (#20) is **DENIED**.

14 **IT IS FURTHER ORDERED** that Defendants' Motion for Judgment on  
15 the Pleadings and Administrative Record (#21) is **GRANTED**.

16 The Clerk shall enter the judgment accordingly.

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19 DATED: August 7, 2012.

20   
21 UNITED STATES DISTRICT JUDGE

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